

**BEFORE THE KANSAS WORKERS COMPENSATION BOARD**

**JESSI L. BUCHANAN**

Claimant

**V.**

**JM STAFFING, LLC**

Respondent

and

**COMMERCE & INDUSTRY INSURANCE CO.**

Insurance Carrier

Docket No. 1,056,149

## ORDER

Claimant requests review of the January 14, 2015, Award by Special Administrative Law Judge (SALJ) Jerry Shelor. The Board heard oral argument on June 2, 2015.

## APPEARANCES

Jeff K. Cooper, of Topeka, Kansas, appeared for claimant. Jodi J. Fox, of Kansas City, Kansas, appeared for respondent and its insurance carrier (respondent).

## RECORD AND STIPULATIONS

The Board has considered the entire record and adopted the stipulations listed in the Award.

## ISSUES

The SALJ found claimant's hip and back pain were aggravated by her right ankle injury, but claimant did not prove her accident was the prevailing factor causing her alleged back and hip injuries, need for medical treatment and any disability or impairment. The SALJ awarded permanent partial disability (PPD) benefits based on a 19 percent permanent impairment of function of the right lower leg.

Claimant maintains she entitled to compensation for her alleged hip and lower back injuries, and is permanently totally disabled (PTD). Alternatively, claimant claims she is entitled to PPD based on a work disability. Claimant requests the Board affirm the SALJ's award of future medical benefits.

Respondent argues the SALJ correctly limited the award to claimant's scheduled right ankle injury, and found the evidence does not establish claimant's alleged hip and low back injuries were a natural and probable consequence of the ankle injury. Respondent also contends claimant's ankle injury is not the prevailing factor causing claimant's hip and back symptoms. Respondent requests the Board affirm the SALJ's award or limit claimant's impairment to 13 percent to the lower extremity.

The issues are:

1. Did claimant's alleged low back and hip injuries arise out of and in the course of her employment, including whether the work accident of May 22, 2011, was the prevailing factor causing claimant's alleged injuries to her hip and back?
2. What is the nature and extent of claimant's disability?
  - a. What is claimant's permanent functional impairment?
  - b. Is claimant permanently and totally disabled?
  - c. Is claimant entitled to a work disability award?
3. Is claimant entitled to future medical treatment?

#### **FINDINGS OF FACT**

##### **Claimant's testimony**

Claimant is 50 years old and resides in Marion, Kansas. She is a high school graduate and trained as a welder at Brooks Trade School eleven years ago.

Claimant was employed by JM Staffing and was assigned to another company to perform an assembly line job. On May 22, 2011, cardboard had been placed on the floor to soak up water. Her right foot became wedged between box slats. Claimant testified when she moved her body, her foot remained wedged. She twisted her right foot and leg and fell to the floor on her back, fracturing her right ankle. After the accident, she experienced extreme pain and was transported by ambulance to the St. Francis Hospital emergency room.

Claimant testified she twisted her ankle completely around, fracturing both sides of her right ankle. Dr. Knappenberger treated claimant surgically on May 22, 2011. Claimant testified she continued to see Dr. Knappenberger periodically and she told the doctor about her low back and hip symptoms. The doctor prescribed physical therapy for claimant's ankle.

According to claimant, she told the physical therapists about her back and hip pain beginning her first day of physical therapy. Claimant asserted the physical therapists worked with her on her back issues. Claimant testified she continues to experience right ankle, hip and lower back pain which limits her activities. She testified she uses a cane.

Regarding the cause of her hip and back symptoms, claimant testified:

A. Okay. I believe it's because of my leg that twisted my - - my leg got twisted and it messed my hip up some how some way, and my leg is kind of turning in. It doesn't work right. In other words, I just kind of feel like my leg got twisted and messed my hip up.<sup>1</sup>

Claimant testified she last saw Dr. Knappenberger on January 13, 2012. According to claimant, she was limping and Dr. Knappenberger prescribed a cane and a brace for her right ankle.

#### **Dr. Knappenberger's testimony**

Kurt R. Knappenberger, M.D., an orthopedic surgeon, treated claimant in the St. Francis Hospital emergency room following her accident on May 22, 2011. X-rays confirmed claimant's bimalleolar ankle fracture. Dr. Knappenberger testified he surgically repaired two fractures of claimant's right ankle with internal fixation, using a plate and screws. Thereafter, Dr. Knappenberger prescribed physical therapy for claimant's ankle. Claimant ankle was also treated with casting, the use of crutches, a brace and a cane.

Dr. Knappenberger testified he last saw claimant on January 13, 2012, when he noted stiffness and loss of range of motion. He ordered additional physical therapy and restricted claimant from working. Dr. Knappenberger intended to follow up with claimant after physical therapy, but she did not return. Dr. Knappenberger testified he hoped over the months since the accident claimant's limping and stiffness would have improved, but it might be permanent.

There is no reference to hip or back symptoms in Dr. Knappenberger's records.

In a report dated October 16, 2012, Dr. Knappenberger rated claimant's permanent impairment at 13 percent to the lower extremity. No permanent work restrictions were imposed.

#### **Dr. Murati's testimony**

Pedro A. Murati, M.D., met with claimant on December 6, 2012, at the request of her counsel. Dr. Murati took a history, reviewed medical records and performed a physical

---

<sup>1</sup> R.H. Trans. at 12.

examination. Claimant told the doctor she experienced pain in her low back, right hip, right foot, right ankle and numbness and tingling in her right lower extremity. Claimant told Dr. Murati she had right hip popping and difficulty sleeping due to back pain. Claimant denied previous problems with her right lower extremity, hip or low back.

Claimant told Dr. Murati that around four months after her accident, she began having pain in her right hip and low back with continued swelling of her right foot and lower extremity. Dr. Murati admitted he noted no references to hip or back pain in the medical records.

Dr. Murati testified claimant's severe limp caused her hip and low back pain and the limp was caused by her ankle fracture. Dr. Murati noted Dr. Knappenberger's records document claimant's limping. Claimant limped when Dr. Murati examined her.

Dr. Murati diagnosed status post open reduction and internal fixation of the right ankle fracture, lower back pain with signs of radiculopathy due to antalgia, right sacroiliac joint dysfunction, and right trochanteric bursitis.

Based on the AMA *Guides*,<sup>2</sup> Dr. Murati rated claimant's permanent impairment for her right ankle at 18 percent to the right lower extremity and seven percent to the right lower extremity for claimant's trochanteric bursitis. The doctor combined the two right lower extremity ratings to a total of 24 percent to the lower extremity. Dr. Murati converted the 24 percent to 10 percent whole person impairment. For low back pain with radiculopathy, Dr. Murati rated claimant's impairment at 10 percent to the whole body. Both whole person impairments combined to 19 percent to the whole person.

Dr. Murati imposed permanent restrictions, all of which were causally related to the May 22, 2011, injury. Dr. Murati restricted claimant to a four-hour work day. According to Dr. Murati, claimant has chronic and constant pain, so she will need frequent breaks. Dr. Murati opined a 15 minute break each hour was reasonable. Dr. Murati opined claimant will have difficulty finding work and if she finds work, she will miss a lot of work days or will have to go home early at times because of her pain.

Dr. Murati recommended claimant have further treatment, including pain management.

In Dr. Murati's opinion, claimant is unable to perform 31 work tasks out of a list of 34 tasks prepared by vocational consultant Karen Terrill, for a 91 percent task loss.

---

<sup>2</sup> American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the AMA *Guides* unless otherwise noted.

**Dr. Do's testimony**

Pat Do, M.D., an orthopedic surgeon, evaluated claimant on April 14, 2014, by order of Administrative Law Judge Becky Sanders (ALJ). Dr. Do took a history, reviewed medical records and performed a physical examination. Dr. Do did not examine claimant's low back or hip.

Dr. Do rated claimant's permanent impairment of function at 20 percent to the right lower extremity. The doctor concluded claimant's hip and back pain were aggravated by the accidental injury, but the hip and low back symptoms were not causally related to her right ankle injury. Dr. Do imposed permanent restrictions related to claimant's right ankle injury.

Dr. Do testified claimant's use of a cane was appropriate. The doctor admitted claimant's use of a cane, a CAM walker or cast, could alter her body mechanics, resulting in hip and back pain. Dr. Do testified an altered gait could aggravate back pain, but not cause permanent structural damage.

Dr. Do testified he saw no references in the medical records to hip or back pain, and claimant did not receive treatment for hip or back complaints. Dr. Do did not examine claimant's back or hip. He testified the cause of claimant's back and hip pain could be multifactorial, from use of a CAM walker or from aging. Dr. Do found no references in the medical records to any preexisting hip or back pain.

Dr. Do testified claimant's hip and back pain may have been temporarily aggravated by work, but was not the prevailing factor causing claimant's hip and back complaints. Use of the cane or walker could cause temporary issues, but for the prevailing factor requirement to be satisfied, Dr. Do believed there must be a permanent structural change or permanent aggravation. Dr. Do was not sure claimant had permanent damage to her hip and back. The following exchange occurred at Dr. Do's deposition:

Q. And on Page 2 of your report you indicated that any hip or back pain may have been aggravated by the work, but it was not the prevailing factor. Why do you think that is?

A. Because you can have folks with, with a lot of ankle strains, ankle fractures using the cane or walker, I can certainly see it that that could cause temporary issues. But as far as prevailing factor, I believe it has to cause a permanent structural change or some kind of, at least a permanent aggravation. So I don't know if she would qualify under those guidelines.<sup>3</sup>

. . .

---

<sup>3</sup> Do Depo. at 13.

Q. As I understand your answer that you gave opposing counsel, you are not able to give an opinion on prevailing factor because you are not sure if she has any permanent damage based on your understanding of prevailing factor; is that correct?

A. That is correct.

Q. But you didn't evaluate her low back or hip to really see if she had any permanent damage; is that correct?

A. That is correct. As I was doing cross examination I did notice that I rotated her right hip and she did have some pain with that.<sup>4</sup>

Dr. Do reviewed the list of work tasks prepared by vocational consultant Steve Benjamin and concluded claimant can no longer perform 13 of 43 work tasks for a 30 percent task loss.

### **Karen Terrill testimony**

Karen Terrill interviewed claimant on March 15 and October 31, 2013, at the request of her attorney. Ms. Terrill recorded claimant's educational and vocational history and completed a list of work tasks claimant performed in the five years preceding the injury. Ms. Terrill identified 34 work tasks claimant performed in such 5-year period.

Ms. Terrill reviewed the medical records and testified claimant is unable to engage in her past relevant work and has no transferable skills to perform sedentary work. Claimant has no knowledge of computers or keyboarding. Ms. Terrill noted claimant cannot carry and must rest 15 minutes every hour. Ms. Terrill testified claimant's limitations are outside the normal industry standards allowing 10 to 15 minute breaks every two hours. According to Ms. Terrill, claimant cannot engage in any substantial, gainful employment and is unable to earn wages.

### **Steve Benjamin testimony**

Steve Benjamin interviewed claimant on February 12 and 13, 2014, at the request of respondent. He developed a list of 43 work tasks claimant performed in the five years before the accident.

Mr. Benjamin testified claimant's use of a cane could impact her employability by limiting her to light and sedentary positions in which little or no walking is required. Mr. Benjamin identified jobs claimant could perform based on her age, work history, transferable skills, education/training, location, how long since she worked, and Dr. Do's

---

<sup>4</sup> Id. at 15-16.

restrictions. If claimant reentered the labor market, she would earn an entry-level wage making up to \$368.20 per week. Mr. Benjamin testified the eight open positions to which claimant could apply within 50 to 60 miles of Marion, Kansas, were drivers, sewing machine operator, trainer, delivery driver, forklift operator and assembler.

### **PRINCIPLES OF LAW AND ANALYSIS**

The Board affirms the award for the following reasons:

1. Claimant testified her back and hip symptoms began when her accident occurred, but claimant told Dr. Murati her hip and back pain began around four months following her accident.

2. Dr. Knappenberger treated claimant beginning on the date of accident until January 13, 2012. There is no reference to hip or back pain in Dr. Knappenberger's records, nor in the records from St. Francis. There is no indication in the doctor's records that any treatment was prescribed or received for claimant's hip or low back.

3. Claimant testified she told her physical therapists about her back and hip pain, and that the therapists gave her advice about how to deal with those symptoms. However, the therapy records are not in evidence, and claimant admitted Dr. Knappenberger did not prescribe therapy for her back and hip complaints.

4. It seems probable that claimant should know when her back and hip pain began. The inconsistency between claimant's testimony and the medical records on that point impairs her credibility.<sup>5</sup> It also seems probable there would be some reference to the back or hip in the hospital records or Dr. Knappenberger's records if claimant developed back and hip pain of the magnitude she described. The lack of such references also lessens the reliability of claimant's testimony.

5. The opinions of the court-appointed neutral physician, Dr. Do, do not support claimant's position. The doctor found claimant's accident was not the prevailing factor causing her hip and back complaints. Dr. Do testified claimant's altered gait, caused by her ankle injury, might cause a temporary aggravation of the hip and back, but would not cause any permanent structural change. Dr. Do's opinions are entitled to weight because he was not hired by any party, and the opinions he expressed were provided at the request of the ALJ.

The Board adopts the SALJ's finding that claimant is entitled to PPD based on a 19 percent permanent impairment of function to the right lower leg.

---

<sup>5</sup> The Board notes that the SALJ who entered claimant's award did not see claimant testify since another judge presided at the regular hearing.

Claimant is entitled to future medical compensation for her right ankle injury upon proper application to the Division.

**CONCLUSIONS**

1. Claimant's work accident of May 22, 2011, was not the prevailing factor causing claimant's alleged hip and back injuries, medical condition and impairment.

2. Claimant is entitled to PPD based on a 19 percent permanent impairment of function to the right lower leg.

3. Claimant is entitled to future medical treatment for her right ankle upon proper application to the Division.

**AWARD**

**WHEREFORE**, it is the finding, decision and order of the Board that the Award of Special Administrative Law Judge Jerry Shelor dated January 14, 2015, is affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of September, 2015.

\_\_\_\_\_  
BOARD MEMBER

\_\_\_\_\_  
BOARD MEMBER

\_\_\_\_\_  
BOARD MEMBER



**Dissenting Opinion**

The undersigned Board Members respectfully disagree with the majority opinion for the following reasons:

1. The evidence is undisputed claimant sustained severe right ankle fractures as a result of her May 22, 2011, accident.

2. The parties do not dispute that claimant's right ankle injury required her to use various assistive devices, including a cast, crutches and a cane. There is also no dispute claimant's ankle injury, and the treatment it required, caused an alteration in claimant's normal gait.

3. The medical records and reports confirm claimant limped following her accidental injury.

4. Claimant testified physical therapists assisted her regarding her back pain, and that testimony is uncontradicted.

5. Dr. Murati and Dr. Do agreed a limp would be consistent with claimant's ankle injury.

6. Claimant made complaints of hip and low back pain to Dr. Murati and Dr. Do.

7. Dr. Murati actually conducted a physical examination of claimant's low back and hip, whereas Dr. Do did not.

8. It is difficult to place significant weight on Dr. Do's "prevailing factor" opinion because the doctor's testimony reflects a misunderstanding of what prevailing factor means. The Act clearly defines "prevailing" as it relates to factor in K.S.A. 2011 Supp. 44-508(g). Contrary to Dr. Do's opinion that prevailing factor has something to do with whether an injury or aggravation is permanent or temporary, prevailing factor has very little to do with the presence or absence of permanency.

9. Dr. Murati's prevailing factor opinion supports claimant's position and reflects a better understanding of the meaning of the prevailing factor requirement than Dr. Do.

10. It is difficult to understand Dr. Do's opinion that limping caused by a lower extremity injury, and the treatment of that injury, may only temporarily aggravate back and hip pain. The question Dr. Do did not explain is: aggravate what? The undisputed evidence establishes claimant did not experience back and hip pain before she fractured her ankle. There is no indication that claimant had preexisting low back or hip issues or injuries that could account for her back and hip complaints.

The undersigned Board Members would reverse the award and remand the claim to the SALJ with directions to address the extent of claimant's whole person permanent impairment and determine whether claimant is entitled to a work disability or PTD.

---

BOARD MEMBER

---

BOARD MEMBER

c: Jeff K. Cooper, Attorney for Claimant  
jeff@jkcooperlaw.com  
toni@jkcooperlaw.com

Jodi J. Fox, Attorney for Respondent and its Insurance Carrier  
mvpkc@mvplaw.com  
jfox@mvplaw.com

Honorable Jerry Shelor, Special Administrative Law Judge